Supreme Court of the United States

October Term, 1976

No. 76-1188

UNITED STATES OF AMERICA,
Petitioner,

vs.

WHITECLIFF, INC., d/b/a WHITE CLIFF MANOR,
Respondent.

BRIEF OF RESPONDENT OPPOSING CERTIORARI

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STATEMENT OF THE CASE

Issues Raised by Pleadings

The instant action was instituted in the United States Court of Claims by the Respondent as a provider of services under the Health Insurance For The Aged Act, commonly known as the Medicare Act, 42 U.S.C. Sections 1395 *et seq.* Respondent's claims against the Petitioner are based upon a breach of contract by the Secretary of Health, Education and Welfare (Secretary), upon a violation of a statutory duty by the Secretary, and upon a deprivation of due process of law resulting from an unlawful delegation of authority by the Secretary.

In defense of the Respondent's claims, the Secretary asserted that the Medicare Act precluded judicial review of the claims, and that in addition, Respondent's claims were unmeritorious.

The issues presented for consideration by the Court of Claims were:

1. Whether 42 U.S.C. Section 405(h) precludes judicial review of the Respondent's claims by the Court of Claims.

2. Whether, regardless of the provisions of 42 U.S.C. Section 405(h), the Court of Claims had jurisdiction to hear Respondent's claims pursuant to the provisions of the Tucker Act, 28 U.S.C. Section 1491.

3. Whether the Secretary violated his contractual and statutory duty to the Respondent by failing to make a suitable retroactive corrective adjustment necessary to reimburse the Respondent for the reasonable cost of services rendered to medicare patients.

4. Whether the Secretary violated the provisions of 42 U.S.C. Section 1395x(v)(1)(A) by failing to promulgate regulations providing for suitable retroactive corrective adjustments where the reimbursement produced by the cost determining methods proves to be either inadequate or excessive.

5. Whether the Secretary violated Respondent's right to due process of law by delegating the final adjudicatory power to the Provider Appeals Committee, a majority of whose members are employees of the fiscal intermediary, Blue Cross Association.

Factual Background

Respondent is the operator of an extended care facility as defined in 42 U.S.C. Section 1395x(j)[1] and is a provider of services to medicare beneficiaries as defined in 42 U.S.C. Section 1395x(u). The Secretary is responsible for the administration of the Medicare Act.

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1. Statute citations are to the 1970 edition of the United States Code. Subsequent amendments to the Medicare Act are inapplicable to this case.

Effective December 17, 1966, Respondent entered into a written contract with the Secretary pursuant to the provisions of 42 U.S.C. Section 1395cc. Pursuant to the terms of the agreement, the Respondent agreed to provide services to medicare beneficiaries, and the Secretary agreed to reimburse the Respondent for the reasonable cost of the services rendered.

In the latter part of 1970, Respondent submitted a claim in the amount of Two Hundred Thirteen Thousand Seven Hundred Fifty-five Dollars ($213,755.00) for a retroactive corrective adjustment of costs to the Secretary's fiscal intermediaries, Blue Cross Association and Blue Cross of Northeast Ohio. The Respondent's claim was rejected by the fiscal intermediaries and subsequently rejected by the Provider Appeals Committee. It is significant to note that three of the five members of the Provider Appeals Committee are employees of the fiscal intermediary, Blue Cross Association.

Having exhausted its administrative remedies by appeal to the Provider Appeals Committee, Respondent instituted an action in the United States Court of Claims. Respondent asserted that the Secretary breached a contractual and statutory duty in failing to make "suitable retroactive corrective adjustments where, for a provider of services for any fiscal period, the aggregate reimbursement produced by the methods of determining costs proves to be either inadequate or excessive," as provided in 42 U.S.C. Section 1395x(v)(1)(A)(ii). The foregoing statutory provision is incorporated into the contractual agreement between the Respondent and the Secretary pursuant to the provisions of 42 U.S.C. Section 1395cc. Respondent's additional claim against the Secretary is based upon a violation of the Respondent's right to due process of law resulting from the Secretary's delegation of the final ad-

judicatory power with respect to Respondent's claim to the Provider Appeals Committee without providing for impartial review of the adjudication of the Respondent's claim.

Court of Claims Held Respondent's Claims Subject to Judicial Review

Upon consideration of Respondent's Motion for Summary Judgment and Petitioner's Cross-Motion for Summary Judgment, the United States Court of Claims determined that it had the power to review Respondent's claims, nothing that while "No consensus has emerged on whether courts may review the merits of *reasonable cost determinations* . . . the courts have uniformly *sustained judicial review* at least for compliance with the *Constitution* and the *governing statute*."[2] *Whitecliff, Inc. v. United States*, 536 F.2d 347, at 349 (Ct. Cl. 1976) (emphasis added).

It is significant to note that in reaching its decision, the Court of Claims referred to this Court's decision in *Weinberger v. Salfi*, 422 U.S. 749 (1975), noting that "the practical effect of the *Salfi* decision was simply the enforcement of the Section 405(g) [42 U.S.C.] procedures and prerequisites to judicial review." *Whitecliff, Inc. v. United States, supra*, at 350. The Court of Claims was obviously guided by this Court's statement in its opinion that "the plain words of the third sentence of §405(h) do not preclude *constitutional challenges*. They simply re-

2. See, *e.g.*, *Aquavella v. Richardson*, 437 F.2d 397, 400-02 (2d Cir. 1971); *Kingsbrook Jewish Medical Center v. Richardson*, 486 F.2d 663, 666-68 (2d Cir. 1973); *Rothman v. Hospital Serv.*, 510 F.2d 956, 958-60 (9th Cir. 1975); *Schroeder Nursing Care, Inc. v. Mutual of Omaha Ins. Co.*, 311 F. Supp. 405, 409 (E.D. Wis. 1970); *Americana Nursing Centers, Inc. v. Weinberger*, 387 F. Supp. 1116, 1118-19 (S.D. Ill. 1975); *South Boston Gen. Hosp. v. Weinberger*, 397 F. Supp. 360 (W.D. Va. 1975); *Goldstein v. United States*, 201 Ct. Cl. 888, *cert. denied*, 414 U.S. 974 (1973).

quire that they be brought under jurisdictional grants contained in the Act, and thus in conformity with the same standards which are applicable to nonconstitutional claims arising under the Act." *Weinberger v. Salfi*, 422 U.S. 749 at 762 (1975) (emphasis added).

Moreover, this Court in the more recent decision of *Califano v. Sanders*, 45 U.S.L.W. 4209, at 4211 (1977) reiterated "the well-established principle that when constitutional questions are in issue, the availability of judicial review is presumed, and we will not read a statutory scheme to take the 'extraordinary' step of foreclosing jurisdiction unless Congress' intent to do so is manifested by 'clear and convincing' evidence."

As indicated above, the claims asserted by the Respondent in the instant action are based upon a breach of a contractual and statutory duty owed by the Secretary and upon a violation of Respondent's right to due process of law. As noted by the Court of Claims in its opinion, there is no disagreement among the lower courts with respect to the power to review claims based upon a violation of the United States Constitution and/or the applicable statutes. The statements to the contrary contained on page 11 of the Petition for Writ of Certiorari implying that there is disagreement in the lower courts with respect to judicial review of the types of claims asserted by the Respondent in the instant matter are not correct.

In view of the foregoing, Respondent submits that the Court of Claims properly and lawfully determined that it had the power to review the Respondent's claims, noting that:

> "In this court, 28 U.S.C. §1491 (the Tucker Act) is the pertinent jurisdictional provision both because of plaintiff's contract with the Government and also because

the Medicare legislation, fairly read, mandates appropriate payment to providers." *Whitecliff, Inc v. United States, supra,* at 351.

Court of Claims Consideration of Respondent's Contractual, Statutory and Constitutional Claims

Having determined that the Respondent's claims were the proper subject for judicial review in the Court of Claims, the Court then considered the merits of the claims.

With respect to the Respondent's claim based upon the Secretary's breach of his contractual and statutory duty owed to the Respondent, the Court agreed with a decision of the United States Court of Appeals for the Second Circuit holding that the retroactive corrective adjustment mandated by 42 U.S.C. Section 1395x(v)(1)(A) applies whenever a cost method produces an inaccurate reimbursement, and that the statute was "designed to rectify mistakes made by HEW in formulating a particular method of determining costs."[3]

The Court of Claims further noted that:

"The Secretary cannot excuse his agency or his agents (here, the BCA) from the statutory duty to make such retroactive adjustments by failing to promulgate the prescribed regulation or by using in its place regulations permitting only a prospective change of method . . . ." *Whitecliff, Inc. v. United States, supra,* at 352.

The Court of Claims determined that in view of the Secretary's failure to consider the Respondent's request for a retroactive corrective adjustment, the claim must be remanded to the Secretary for an evidentiary hearing to

3. *Kingsbrook Jewish Medical Center v. Richardson,* 486 F.2d 663, 670 (2d Cir. 1973), *quoted with approval in Whitecliff, Inc. v. United States, supra,* at 352.

allow the Respondent an opportunity to prove its actual costs and the inadequacy of its reimbursement.

With respect to Respondent's claim of denial of due process, the Court of Claims determined that it was not necessary to decide the claim in view of the remand, but noted that since "one district court has found this issue to be substantial and another has ruled that the BCA Committee's composition does deprive a provider of the impartial decision-maker required by cases such as *Goldberg v. Kelly,* 397 U.S. 254 (1970) . . . [t]he Secretary could obviate any due process challenge to the decision on remand by providing plaintiff with a hearing before a body not composed in its majority of BCA employees." *Whitecliff, Inc. v. United States, supra,* at 352-53.

REASONS SUPPORTING THE DENIAL OF CERTIORARI

Respondent submits that the following considerations support the denial of certiorari in the instant matter:

1. In 1972 and in 1974, subsequent to the accrual of Respondent's claims, Congress amended the Medicare Act to provide for judicial review, in a district court, of medicare provider reimbursement disputes. The amendment authorizes judicial review with respect to cost reporting periods ending on or after June 30, 1973. Accordingly, the issue of judicial review presented in the instant case is of only limited significance. This Court's determination of the issues involved herein will have no impact upon cases involving cost periods ending on or after June 30, 1973. Respondent submits that this Court's time and effort should not be consumed with cases of such limited consequence.

2. As noted by the Court of Claims in its opinion in *Whitecliff, Inc v. United States, supra,* at 349, the lower courts have uniformly sustained judicial review of medicare provider claims based upon a violation of the United States Constitution or a violation of the applicable statutes. Since the claims asserted by the Respondent in the Court of Claims aver a violation of constitutional, statutory and contractual duties by the Secretary, it is apparent that there is no dispute in the lower courts as to the right of judicial review. Respondent submits that this Court should not expend its time and effort on issues upon which the lower courts have uniformly agreed.

3. As noted above, the Court of Claims has remanded to the Secretary the Respondent's claim for reimbursement directing that an evidentiary hearing be held to allow the Respondent an opportunity to prove its actual costs and the inadequacy of its reimbursement. It is clear therefore that the Respondent's claim has not been finally and fully adjudicated. Consequently, this Court's consideration of the instant matter may prove to be unnecessary depending upon the final adjudication of the Respondent's claim for reimbursement.

4. This Court has indicated in decisions rendered within the past two years that neither Section 405(g), nor Section 405(h) of Title 42 of the United States Code precludes judicial review of constitutional issues. See *Califano v. Sanders, supra; Weinberger v. Salfi, supra.* Respondent submits that since at least one of the issues asserted in the instant action is based upon the Secretary's violation of Respondent's right to due process of law, it is manifest from this Court's statements in the opinions cited above that the Court of Claims is not precluded from reviewing, at the very minimum, the constitutional claim. Accordingly, Respondent submits that there is no need for this

Court to once again reiterate its position upon the power of the lower courts to review constitutional questions.

5. The jurisdiction of the Court of Claims "to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress . . . or upon any express or implied contract with the United States" is clearly set forth in 28 U.S.C. Section 1491, and any assertion that the Court of Claims lacks the power to hear claims asserting such issues is totally untenable and not worthy of consideration by this Court.

6. Contrary to the assertions contained *inter alia* in the Petition for Writ of Certiorari, Respondent's action in the Court of Claims does not seek a review of the Secretary's determination regarding reimbursement of costs to a provider, but rather, seeks judicial review and relief as a result of the failure of the Secretary to promulgate regulations and to consider Respondent's claim for a suitable retroactive corrective adjustment as mandated by 42 U.S.C. Section 1395x(v)(1)(A). Viewing the Respondent's claim in this light, it is apparent that judicial review of the claim would not in any way interfere with the administration of the Medicare Act by the Secretary, but rather would serve to assure the participants that the Secretary's actions are consistent with the mandates of the statute. Accordingly, Respondent submits that such a basic requisite of justice does not warrant reconsideration and rearticulation by this Court.

CONCLUSION

For the reasons and authorities stated above, Respondent submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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